

SUBCHAPTER 14. CONFIDENTIALITY

7:14B-14.1 Scope and exchange of information

(a) This subchapter sets forth the procedures for making information received by the Department in administering the Underground Storage Tank program under N.J.A.C. 7:14B-1 available to the public and maintaining confidentiality of certain parts of that information.

(b) All information collected by or originated by the Department in connection with underground storage tank regulatory activities under N.J.A.C. 7:14B shall be generally available to the public except as provided otherwise in this subchapter.

(c) Claims for confidentiality will be decided by the Department in accordance with the provisions of this subchapter.

(d) If a request for information is made for interagency or intra-agency memoranda or letters, the Department may deny this request if such request is exempted from disclosure pursuant to 5 U.S.C. § 552(b)(5).

(e) If a request for information is made for investigatory records, the Department may deny the request if such request is exempted from disclosure pursuant to 5 U.S.C. § 552(b)(7) or N.J.S.A. 47:1A-3.

(f) When USEPA supplies information to the Department which was submitted to USEPA under a claim of confidentiality, the information shall be subject to the conditions set forth in 40 CFR Part 2 and this subchapter. If the Department obtains information from USEPA that is not claimed to be confidential, the Department may make that information available to the public without further notice to any interested party.

(g) Notwithstanding any other provision of this subchapter, any information obtained or used in the administration of the underground storage tank program shall be available to EPA and U.S. Department of Justice upon request without restriction. If the information has been submitted to the Department under a claim of confidentiality, the Department shall submit that claim to EPA when providing information as required in this section.

(h) Access to any information for which a confidentiality claim has been made will be limited to Department employees, representative and contractors, whose activities necessitate such access. Also USEPA employees may have access to confidential information subject to (f) above.

(i) No disclosure of information for which a confidentiality claim has been asserted shall be made to any other persons except as provided in this subchapter.

(j) Nothing in this section shall be construed as prohibiting the incorporation of confidential information into cumulations of data subject to disclosure as public records, provided that such disclosure is not in a form that would foreseeably allow persons, not otherwise having knowledge of such confidential information, to deduce from it the confidential information or the identity of the person who supplied it to the Department.

7:14B-14.2 Confidential claims

(a) Any owner or operator of an underground storage tank system required to submit any information pursuant to the Act or this chapter which in the owner's or operator's opinion constitutes trade secrets, proprietary information, or information related to national security, may assert a confidentiality claim by following the procedures set forth in this subchapter.

(b) Any owner or operator submitting any information to the Department and asserting a confidentiality claim covering any information contained therein shall submit

two documents to the Department. One document shall contain all the information required by the Act or this chapter including any information which the owner or operator alleges to be entitled to confidential treatment. The second document shall be identical to the first except that it shall contain no information which the owner or operator alleges to be entitled to confidential treatment. The second document can be a photocopy of the first, with the allegedly confidential material blacked out.

(c) The top of each page of the first document containing the information which the owner or operator alleges to be entitled to confidential treatment shall display the heading "CONFIDENTIAL" in bold type, or stamp.

(d) All parts of the text of the first document which the owner or operator alleges to be entitled to confidential treatment shall be underscored or highlighted in a clearly identifiable manner. This manner of marking confidential information shall be such that both the allegedly confidential information and the underscoring or highlighting is reproducible on photocopying machines.

(e) The first document, containing the information which the owner or operator alleges to be entitled to confidential treatment, shall be sealed in an envelope which shall display the word "CONFIDENTIAL" in bold type or stamp on both sides. This envelope, together with the second, nonconfidential document (which may or may not be enclosed in a separate envelope, at the option of the owner or operator), shall be enclosed in another envelope for transmittal to the Department. The outer envelope shall bear no marking indicating the confidential nature of contents.

(f) To ensure proper delivery, the complete package should be sent by certified mail, return receipt requested, or by other means which will allow verification of receipt. Ordinary mail may be used, but the Department will assume no responsibility for packages until they are actually received at the address provided in N.J.A.C. 7:14B-2.2(b).

(g) The request for confidentiality shall be accompanied by the applicable fee pursuant to N.J.A.C. 7:14B-3.7.

7:14B-14.3 Disclosure of confidential information to contractors

(a) The Department may disclose confidential information to a contractor of the Department when the contractor's activities necessitate such access.

(b) No information may be disclosed to a contractor unless the contract in question provides that the contractor and the contractor's employees, agents and representatives use the information only for the purpose of carrying out the work required by the contract, not disclose the information to anyone not authorized in writing by the Department, store the information in locked cabinets in secure rooms, and return the information to the Department whenever the information is no longer required by the contractor for the performance of the work required by the contract.

(c) Disclosure in violation of this subchapter or the contractual provisions described in (b) above shall constitute grounds for debarment or suspension as provided in N.J.A.C. 7:1-5 Debarment, Suspension and Disqualification from Department Contracting, in addition to whatever other remedies may be available to the Department at equity or law.

7:14B-14.4 Confidentiality determinations

(a) Information for which a confidentiality claim has been asserted will be treated by the Department as entitled to confidential treatment, unless the Department determines that the information is not entitled to confidential treatment as provided for in this subchapter.

(b) The Department shall act upon a confidentiality claim and determine whether information is or is not entitled to confidential treatment whenever the Department:

1. Receives a request under N.J.S.A. 47:1A-1 et seq. to inspect or copy such information;

2. Desires to determine whether information in its possession is entitled to confidential treatment; or

3. Desires for any reason in the public interest to disclose the information to persons not authorized by this subchapter to have access to confidential information.

(c) The Department shall make the initial determination whether information is or is not entitled to confidential treatment.

1. If the Department determines that information is not entitled to confidential treatment, it shall so notify the owner or operator who submitted the information.

2. The notice required under this subsection shall be sent by certified mail, return receipt requested and shall state the reasons for the Department's initial determination.

3. An owner or operator who wishes to contest a determination by the Department shall, within 30 days of notification of the determination, submit evidence to support the owner's or operator's contention that the Department's initial determination was incorrect. The evidence may include, but need not be limited to, a statement indicating:

- i. The period of time for which confidential treatment is desired by the owner or operator (for example, until a certain date, until the occurrence of a specified event, or permanently);

- ii. The measures taken by the owner or operator to guard against undesired disclosure of the information to others;

iii. The extent to which the information has been disclosed to others, and the precautions taken in connection therewith; and

iv. The extent to which disclosure of the information would result in substantial damage to the owner or operator, including a description of the damage, an explanation of why the damage would be substantial, and an explanation of the relationship between disclosures and the damage.

4. Failure of an owner or operator to furnish timely comments or exceptions waives the owner's or operator's confidentiality claim.

5. The owner or operator may assert a confidentiality claim to any information submitted to the Department by an owner or operator as part of its comments pursuant to (c)3 above.

6. The Department may extend the time limit for submitting comments pursuant to (c)3 above for good cause shown by the owner or operator and upon receipt of a request in writing.

(d) After receiving the evidence, the Department shall review its initial determination and make a final determination.

1. If, after review, the Department determines that the information is not entitled to confidential treatment, the Department shall so notify the owner or operator by certified mail, return receipt requested. The notice shall state the basis for the determination, that it constitutes final agency action concerning the confidentiality claim, and that the Department shall make the information available to the public on the 14th day following receipt by the owner or operator of the written notice.

2. If, after review, the determination is made that information is entitled to confidential treatment, the information shall not be disclosed, except as otherwise

provided by this subchapter. The owner or operator shall be notified of the Department's determination by certified mail, return receipt requested. The notice shall state the basis for the determination and that it constitutes final agency action.

7:14B-14.5 Substantive criteria for use in confidentiality determinations

(a) When the owner or operator satisfies each of the following substantive criteria, the Department shall determine that the information for which a confidentiality claim has been asserted is confidential:

1. The owner or operator has asserted a confidentiality claim which has not expired by its terms, been waived or withdrawn;
2. The owner or operator has shown that reasonable measures have been taken to protect the confidentiality of the information and that the owner or operator intends to continue to take such measures;
3. The information is not, and has not been, available or otherwise disclosed to other persons without the owner's or operator's consent (other than by subpoena or by discovery based on a showing of special need in a judicial or quasi-judicial proceeding, as long as the information has not become available to persons not involved in the proceeding);
4. No statute specifically requires disclosure of the information; and
5. Except for information related to national security, the owner or operator has shown that disclosure of the information would be likely to cause substantial damage to its competitive position.

7:14B-14.6 Disclosure of confidential information to USEPA and other public agencies

(a) The Department may disclose confidential information to persons other than Department employees, representatives, and contractors only as provided in this section or N.J.A.C. 7:14B-14.3.

(b) The Department may disclose confidential information to any other State agency or to a Federal agency if:

1. The Department receives a written request for disclosure of the information from a duly authorized officer or employee of the other agency;
2. The request sets forth the official purpose for which the information is needed;
3. The Department notifies the other agency of the Department's determination that the information is entitled to confidential treatment, or of any unresolved confidentiality claim covering the information;
4. The other State or Federal agency has first furnished to the Department a written formal legal opinion from the agency's chief legal officer or counsel stating that under applicable law the agency has the authority to compel the person who submitted the information to the Department to disclose such information to the other agency;
5. The other agency agrees not to disclose the information further unless:
 - i. The other agency has statutory authority both to compel production of the information and to make the proposed disclosure; or

ii. The other agency has obtained the consent of the affected owner or operator to the proposed disclosure; and

6. The other agency has adopted rules or operates under statutory authority that will allow it to preserve confidential information from unauthorized disclosure.

(c) Except as otherwise provided in N.J.A.C. 7:14B-14.7, the Department shall notify in writing the owner or operator who supplied the confidential information of:

1. Its disclosure to another agency;
2. The date on which disclosure was made;
3. The name of the agency to which disclosed; and
4. A description of the information disclosed.

7:14B-14.7 Disclosure by consent

(a) The Department may disclose any confidential information to any person if it has obtained the written consent of the owner or operator to such disclosure.

(b) The giving of consent by an owner or operator to disclose shall not be deemed to waive a confidentiality claim with regard to further disclosures unless the authorized disclosure is of such nature as to make the disclosed information accessible to the general public.

7:14B-14.8 Imminent and substantial danger

(a) Upon a finding that disclosure of confidential information would serve to alleviate an imminent and substantial danger to public health and the environment, the Department may:

1. Prescribe and make known to the owner or operator such shorter comment period (see N.J.A.C. 7:14B-14.4(c)4), post-determination waiting period (see N.J.A.C. 7:14B-14.4(d)1), or both, as it finds necessary under the circumstances; or

2. Disclose confidential information to any person whose role in alleviating the danger to public health and the environment necessitates that disclosure. Any such disclosure shall be limited to information necessary to enable the person to whom it is disclosed to carry out the activities in alleviating the danger.

(b) Any disclosure made pursuant to this section shall not be deemed a waiver of a confidentiality claim, nor shall it, of itself, be grounds for any determination that information is no longer entitled to confidential treatment.

(c) The Department will notify the owner or operator of any disclosure made pursuant to this section as soon as is feasible.

7:14B-14.9 Security procedures

(a) Submissions to the Department pursuant to the Act and this chapter will be marked confidential and opened only by persons authorized by the Department engaged in administering the Act and this chapter.

(b) All submissions entitled to confidential treatment shall be stored by the Department or its contractors only in locked cabinets.

(c) Any record made or maintained by Department employees, representatives, or contractors which contains confidential information shall contain appropriate indicators identifying the confidential information.

7:14B-14.10 Wrongful access or disclosure; penalties

(a) A person may not disclose, seek access to, obtain or have possession of any confidential information obtained pursuant to the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq., or this chapter, except as authorized by this subchapter.

(b) Every Department employee, representative, and contractor who has custody or possession of confidential information shall take appropriate measures to safeguard such information and to protect against its improper disclosure.

(c) A Department employee, representative, or contractor shall not disclose, or use for his or her private gain or advantage, any information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position of employment or contractual relationship with the Department.

(d) If the Department finds that any person has violated the provisions of this subchapter, it may:

1. Commence a civil action in Superior Court for a restraining order and an injunction barring that person from further disclosing confidential information.

2. Pursue any other remedy available by law.

(e) In addition to any other penalty that may be sought by the Department, violation of this subchapter by a Department employee shall constitute grounds for dismissal, suspension, fine or other adverse personnel action.

(f) Use of any of the remedies specified under this section shall not preclude the use of any other remedy.